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Supreme Court of the United States,

OCTOBER TERM, 1903.

ROBERT A. CHESEBROUGH,
Plaintiff in Error,

AGAINST

THE UNITED STATES.

No. 152.

This case comes before the court by a writ of error to the United States District Court for the Southern District of New York.

The action was brought to recover the sum of Six hundred dollars, which, under the Act of Congress of June 13th, 1898, the complainant was compelled to pay as a tax upon the conveyance of a parcel of real estate owned by him and as a condition without which such conveyance was prohibited, made punishable as a misdemeanor, and the instrument of conveyance declared invalid and of no effect, and not competent evidence in any court.

Upon a demurrer by the attorney for the United States, judgment was rendered sustaining the demurrer and dismissing the petition (Rec., pp. 3 to 7). The ground of the action is the unconstitutionality of the statute imposing the tax.

For the convenience of the court the relevant portions of the Act of June 13th, 1898, and of the Constitution are here printed:

THE STATUTE.

"On and after the first day of July, 1898, there "shall be levied, collected and paid, for and in re-

"spect of the several bonds, debentures or cer-
"tificates of stock, and of indebtedness, and other
"documents, instruments, matters and things men-
"tioned and described in Schedule A of this act,
"or for or in respect of the vellum, parchment, or
"paper upon which such instruments, matters or
"things, or any of them, shall be written or printed
"by any person or persons, or party who shall
"make, sign or issue the same, or for whose use or
"benefit the same shall be made, signed or issued,
"the several taxes or sums of money set down in
"figures against the same, respectively, or other-
"wise specified or set forth in the said schedule."
(Act of June 13th, 1898, §6.)

Schedule A:

"Conveyance: Deed, instrument, or writing
"whereby any lands, tenements, or other realty sold
"shall be granted, assigned, transferred, or other-
"wise conveyed to, or vested in, the purchaser or
"purchasers or any other person or persons, by his,
"her or their direction, when the consideration
"or value exceeds one hundred dollars and does
"not exceed five hundred dollars, fifty cents; and
"for each additional five hundred dollars or frac-
"tional part thereof in excess of five hundred dol-
"lars, fifty cents." (Act of June 13th, 1898,
Schedule A.)

"That if any person or persons shall make, sign
"or issue, or cause to be made, signed or issued,
"any instrument, document, or paper of any kind
"or description whatsoever, without the same be-
"ing duly stamped for denoting the tax hereby im-
"posed thereon, or without having thereupon an
"adhesive stamp to denote said tax, such person or
"persons shall be deemed guilty of a misdemeanor,
"and upon conviction thereof shall pay a fine of not
"more than one hundred dollars, at the discretion
"of the court, and such instrument, document or

"paper aforesaid shall not be competent evidence "in any court." (Act of June 13th, 1898, §7.)

"That any person or persons who shall register, "issue, sell or transfer or who shall cause to be is- "sued, registered, sold or transferred any instru- "ment, document or paper of any kind or descrip- "tion whatsoever mentioned in Schedule A of this "Act, without the same being duly stamped or hav- "ing thereupon an adhesive stamp for denoting the "tax chargeable thereon and cancelled in the man- "ner required by law, with intent to evade the "provisions of this Act shall be deemed guilty of "misdemeanor and upon conviction thereof shall "be punished by a fine not exceeding fifty dollars "or by imprisonment not exceeding six months, or "both, in the discretion of the court, and such in- "strument, document or paper not being stamped "according to law shall be deemed invalid and of "no effect." (Act of June 13th, 1898, §13.)

THE CONSTITUTION.

"Representatives and direct taxes shall be ap- "portioned among the several States which may be "included within this Union, according to their "respective numbers. * * * The actual "enumeration shall be made within three years "after the first meeting of the Congress of the "United States and within every subsequent term "of ten years." (Const., Art. 1, §1, subd. 3.)

"No capitation, or other direct tax shall be laid, "unless in proportion to the census or enumeration "hereinbefore directed to be taken." (Const., Art. 1, §9, subd. 4.)

"Representatives shall be apportioned among the "several States according to their respective num- "bers." (XIVth Amendment, §2.)

If the tax here in question be a direct tax the statute attempting to impose it is admittedly unconstitutional.

Contents of the Brief.

This Brief is divided into the following heads:

1. Fundamental propositions upon which the argument of plaintiff in error is based.

2. The argument that the tax is a direct tax considered on principle and as an original question.

3. Examination of the genesis and historical development of stamp taxes on conveyances of real estate in England and the United States.

4. Answers to objections and a consideration of the cases cited by the defendant in error as adverse to plaintiff's contention.

POINT I.

Fundamental propositions upon which the argument of plaintiff in error is based.

We contend:

A. The question is whether this is a direct tax; if so, it is necessarily void because not apportioned.

The category of direct taxes, within the meaning of that phrase as used in the Constitution, is determined partly by an examination of the question as an original one in the light of general, logical and economic considerations and partly in the light of the history of taxation in England and America. It is settled law that the Court will look at the real substance and effect of the tax and not be governed or influenced by the particular form or guise in which the tax is laid.

B. Property is a combination or bundle of separate rights or powers conferred by the law upon persons. The three essential rights composing the legal concept "property" are

(1) possession and the right thereto;
(2) income or yield, and
(3) alienability *inter vivos.*

The destruction or inhibition of any of these rights would be a direct destruction or deprivation of property.

C. The tax is direct because it falls directly upon one of the fundaments of property, that is to say, alienability, in precisely the same manner as a tax on land or general property falls upon the right of possession and an income tax on the right of enjoyment. Each of these latter taxes is a direct tax upon the property because upon one of the essential legal attributes which constitute property.

Take away possession or the right thereto and the basis of property fails; confiscate income and the present concept of property as consecrated by our Constitution and legal institutions is erased from our law; prohibit the power of sale and property becomes a mere emasculated right of possession known only to primitive times and to the ancient feudal system based on the ultimate ownership of all land by the crown.

D. There is nothing either in the history of the stamp tax on conveyances in England or in the United States which militates against the view that the tax here involved is a direct tax, but on the contrary this history would tend to show that the tax is really only in form a stamp tax, but a direct property tax in fact. This is also the view of the standard writers on political economy.

The decisions of this Court do not contravene appellant's view, but on the contrary the reasoning in recent cases, notably, *The Income Tax cases*, 157, 158 U.

S., *Nicol* v. *Ames*, 173 U. S., and the *Fairbank* case, 181 U. S., necessarily involve principles, the logical inference from which demonstrate this tax to be direct.

POINT II.

The argument that the tax is a direct tax considered on principle and as an original question.

Austin in his great work on Jurisprudence defines ownership as follows:

> " Section 515. The right to use or deal with " some given subject in a manner or to an extent " which though not unlimited is indefinite. * *
>
> " 518. It is a right residing in a person over or " to a person or thing and availing against other " persons universally or generally. * *
>
> " 1103. It is a right imparting to the owner a " power of indefinite user, capable of being trans- " mitted to universal successors by way of descent, " and imparting to the owner the power of dis- " position from himself. * * (Strictly speaking " and to make the definition apply to every sys- " tem of law), *disposition here must be confined to* " *an alienation to take effect in the lifetime of the* " *party entitled. The powers of alienation in ex-* " *tremis, are* in most systems of law, subject to pecu- " liar restraint."

The more recent and equally learned and scientific writer, Holland, in his Jurisprudence, page 194, says:

> " It is a great advance in civilization when law " throws around the mere fact of possession that " protection which the possessor could previ-

" ously have won for it only by his own right " hand. It is a still further advance when law " gives to a man that far ampler measure of right " over an object, quite irrespectively of his having " any actual or even constructive control over it, " which is known as 'Ownership.' The higher is " no doubt a development of the lower right. * * " The right of ownership is, however, unlimited " only in comparison with other rights over ob- " jects. In accordance with the maxim '*sic utere* " *tuo ut alienum non laedas.*' It must always be en- " joyed in such a way as not to interfere with the " rights of others and is therefore defined in the " French Code as: 'Le droit de jouir et dis- " 'poser des choses de la manière la plus absolu " 'pourvu qu'on n'en fasse pas en usage prohibé par " *les lois ou par les règlements.* (Art. 544.) * * Va- " rious attempts have been made to enumerate the " attributes or powers of an owner. He is said to " have rights '*utendi*,' '*fruendi*,' '*abutendi*,' '*fructus* " *percipiendi*,' '*possidendi*,' '*alienandi*,' *and* '*vendi-* " *candi*.' But what has to be said with reference to " the orbit or contents of the right of ownership " may be conveniently arranged under the three " heads *of possession, enjoyment and disposition.* " * * The right of disposition carries with it the " right of alteration or destruction and also *the* " *right of alienation.* (p. 196.) * * * *" Mirabeau defines property as " *un avantage conféré par les* " *conventions sociales.* (p. 152.) Recent investiga- " tors, and especially Sir Henry Maine have abun- " dantly shown that there is in early times but " little trace of individual ownership. * * * The " idea that property really belongs to a family " group and that the right of an individual is " merely to administer his share of it during his " lifetime may be said still to survive in those pro- " visions against the total disinheriting of rela- " tions which modern systems have borrowed

> " from the Roman law and less obviously in the " rights given to next of kin under statutes of " distribution. * * The principle that a man " may voluntarily select the person on whom his " property is to devolve after his death is of later " origin than the principle of intestate succession. " Such a selection had at first to be ratified by " legislative authority in order to oust the rights " of the relatives." (p. 153.)

From the above quotations it is evident that the power of disposition *inter vivos* is an essential attribute of property. It is equally fundamental with possession and enjoyment and the three together form the legal concept of property which is protected by the Constitution and which even the paramount power of Congress cannot attain. It is idle to argue that in the remote past or under the Norman feudal system once prevalent in England property was not alienable or allodial; all legal concepts and institutions are the product of evolution and development; in using the word " property " our Constitution and our laws do not mean the hut which the primitive Ayran was able to occupy so long, and only so long, as his good right hand could vanquish all comers who attempted to disturb his precarious possession, but " property," as that term is now understood and consecrated in the United States Constitution, has a fixed and definite meaning, the result of centuries of legal and social development.

We insist somewhat upon these seemingly elementary principles for the reason that we believe a tax on the power of disposition *inter vivos* (that is to say sale or conveyance) is direct, precisely as is a tax upon property generally or upon the income thereof, within the meaning of the Constitution, a direct tax. (*Income tax cases.*) Alienability cannot be considered a less essential part of property than income or possession. It is in fact a fundamental right. As the learned Mr. Justice Brown

has so aptly said (*United States* v. *Perkins*, 163 U. S., 625):

> " While the laws of all civilized States recognize " in every citizen the absolute right to his own " earnings and to the enjoyment of his own prop- " erty, and the increase thereof, *during his life*, " except so far as the State may require him to " contribute his share for public expenses, the " right to dispose of his property by will has " always been considered purely a creature of " statute and within legislative control." (p. 627.)

Numerous decisions of this Court, notably *Magoun* v. *Illinois Trust Company*, 170 U. S., 283, *United States* v. *Perkins*, 163 U. S., 625, and the recent case of *Knowlton* v. *Moore*, 178 U. S., 41, and the cases there cited, abundantly show that the right to dispose of property by testament or the right to take by intestate succession are not fundamental rights of property protected by the Constitution of the United States.

It is this distinction between the right of alienation *inter vivos* and the rights just mentioned which make inapplicable to the present case the case of *Knowlton* v. *Moore* and others which had to deal with a purely municipal right, that is to say heritability and testacy.

The criterion as to whether this tax is in principle one directly imposed upon the property transferred is easily seen by the following considerations: If Congress should enact generally that all real estate should be inalienable absolutely or only under legislative or administrative permission, it is perfectly clear that the inhibition of the Constitution against the taking of property without due process of law or without the payment of proper compensation would be absolutely violated, and this would be equally true of legislation by the States.

A very good illustration is found in the case of *Wynehamer* v. *The People*, in 13 N. Y., 378. An act

of the Legislature of New York made in pursuance of a desire to restrain the use of intoxicating beverages made it unlawful to sell certain alcoholic liquors. This was held to prevent a disposition of property by the owner and thus to virtually destroy that property, and hence to contravene Article 1, Section 6 of the State Constitution,

> " That no person shall be deprived of life, lib-
> " erty or property without due process of law;
> " nor shall private property be taken for public
> " use without just compensation."

Judge Comstock there remarked in referring to the sale of liquors (p. 384):

> " In this country the right of property in them
> " (liquors) was never so far as I know for an instant
> " questioned. In this State they were bought and
> " sold like other property. * * In short, I do
> " not understand it to be denied that they were
> " property in just as high a sense as any other
> " possession which a citizen can acquire."

After stating the objections against the use of alcohol on social grounds, he continues:

> " But if such arguments can be allowed to sub-
> " vert the fundamental idea of property, then
> " there is no private right entirely safe, because
> " there is no limitation upon the absolute discre-
> " tion of the legislature, and the guarantees of
> " the Constitution are a mere waste of words.
> " The foundation of property is not in philosophic
> " or scientific speculations, nor even in the sug-
> " gestions of benevolence or philanthropy. It is
> " a simple and intelligible proposition, admitting,
> " in the nature of the case, of no qualification,
> " that that is property *which the law of the land*
> " *recognizes as such. It is, in short, an institution*
> " *of law, and not a result of speculations in science,*

" *in morals or economy.* (pp. 384-5.) * * As property
" the right to sell them (liquors) is denied and *their*
" *commercial value is thus annihilated.* (p. 389.)
" * * When a law annihilates the value of proper-
" ty *and strips it of its attributes, by which alone it is*
" *distinguished as property*, the owner is deprived
" of it according to the plainest interpretation,
" and certainly within the spirit of a constitution-
" al provision intended expressly to shield private
" rights from the exercise of arbitrary power."
" (p. 398.)

Upon principle then, it is entirely clear that a tax upon alienability is a direct tax upon property as Mr. Justice Peckham well remarked in *Nicol* v. *Ames*, 173 U. S., 509, at p. 518.

" It is asserted to be a direct tax, because it is
" a tax upon the sale of property measured by the
" value of the thing sold, and such a tax is a di-
" rect tax upon the property itself, and therefore
" subject to the rule of apportionment. Various
" cases are cited, from *Brown* v. *Maryland*, 12
" Wheat., 419, down to those involving the valid-
" ity of the income tax, 157 U. S., 429; 158 U. S.,
" 601, for the purpose of proving the correctness
" of this proposition. All the cases involved the
" question whether the taxes to which objection
" was taken amounted practically to a tax on
" the property. If this tax is not *on the property*
" *or on the sale thereof*, then these cases do not
" apply." (pp. 518–19.)

The Court then holds that the tax was not upon the sale itself but upon the privilege of dealing at an exchange :

" A sale at an exchange does form a proper
" basis for a classification which excludes all sales
" made elsewhere from taxation." * *

> " A tax upon the privilege of selling property at " the exchange * * differs radically from a tax up- " on every sale made in any place. *The latter tax is* " *really and practically upon property. It takes no* " *notice of any kind of privilege or facility, and* " *the fact of a sale is alone regarded.*" (p. 521.)

While the question here involved has never been directly decided in this Court the foregoing extract from the opinion of *Nicol* v. *Ames* would clearly indicate the opinion of the Court to be that a tax upon all sales generally was a direct tax upon the property. Direct taxes have been defined by this Court as follows:

> " Direct taxes in a general and large sense may " be described as taxes derived immediately from " the person or from real or personal property " without any recourse therefrom to other sources " for reimbursement." *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S., 429, at p. 588.

It cannot, of course, be seriously contended that this tax is in its nature a stamp tax. We will see in examining the historical development of stamp taxation that there is such a thing as a true stamp tax, that is to say, a tax imposed under the guise of a stamp upon certain legal instruments and which tax is levied upon the instruments as such and apart from the property or transaction to which they have reference.

The Court will look at the substance of a tax and not at the form as was clearly held in the decision in the recent case of *Fairbank* v. *The United States*, 181 U. S., 283. Even the dissenting opinion in that case shows that the tax here involved which is proportioned to the amount of the transaction is not a real stamp tax. Mr. Justice Harlan there says (p. 317):

> " If Congress had graduated the stamp duty " *according to the quantity or value* of the articles " exported, there might have been ground for

"holding that the purpose and the necessary "result was to tax the property and not the "vellum, parchment or paper on which the bill of "lading was written or printed."

And again he says:

"A stamp duty has now, and has had for "centuries, a well-defined meaning. It has always "been distinguished from an ordinary tax *meas-* "*ured by the value* or kind of the property taxed. "If Congress, in respect of a bill of lading for "articles to be exported, had imposed a tax of "five thousand dollars for and in respect of the "vellum, parchment or paper upon which such "bill was written, the Courts, looking beyond "form and considering substance, might well have "held that such an act was contrary to the "settled theory of stamp tax laws, and that the "purpose and necessary operation of such legisla- "tion was, in violation of the Constitution, to tax "the articles specified in such bill and not to im- "pose simply a stamp duty." (p. 318.)

The illustration given by the learned Justice is especially apposite in this case as the stamps on realty conveyances often amounted to hundreds of dollars and sometimes went into the thousands, thus making it an absurdity to consider the tax as one upon the parchment or vellum upon which the conveyance was printed.

How far this Court in determining the question as to whether a tax is direct or not will be governed by the opinions of economists as to the shifting of the incidence of the tax from the seller to the buyer was much discussed in the famous Income Tax Cases. It is an economic question much debated and upon which economists have held various and shifting theories. The Court has held repeatedly that it will not be guided by

the views of economists upon this point and will only advert to the question of incidence as a make-weight in reaching the conclusion as to whether a tax is direct or indirect. The incidence is however, an argument which the Court will look at among others in reaching a conclusion.

This tax is a direct tax in the economic sense.

The framers of the Constitution were familiar with the "Wealth of Nations," the great standard work on economics. Their views as to what taxes were direct *i. e.*, incapable of being shifted must have been largely influenced by the opinion of Adam Smith. He says:

> "Taxes upon the transference of property from "the dead to the living, fall finally as well as im- "mediately upon the person to whom the prop- "erty is transferred. Taxes upon the sale of land "fall altogether upon the seller. The seller is "almost always under the necessity of selling, and "must, therefore, take such a price as he can get. "The buyer is scarce ever under the necessity of "buying, and will, therefore, only give such a price "as he likes. He considers what the land will "cost him in tax and price altogether. The more "he is obliged to pay in the way of tax, the less "he will be disposed to give in the way of price. "Such taxes, therefore, fall almost always upon a "necessitous person, and must therefore, be fre- "quently very cruel and oppressive. * * *
>
> "Such stamp duties as those in England upon "cards and dice, upon newspapers and periodical "pamphlets, etc., are properly taxes upon con- "sumption; the final payment falls upon the per- "sons who use or consume such commodities. "Such stamp duties as those upon licenses to re- "tail ale, wine, and spirituous liquors, though in- "tended, perhaps, to fall upon the profits of the re- "tailers, are likewise finally paid by the consumers "of those liquors. Such taxes, though called by

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" the same name, and levied by the same officers
" and in the same manner with the stamp duties
" above mentioned upon the transference of prop-
" erty, are however of a quite different nature, and
" fall upon quite different funds."

Smith on the Causes of the Wealth of Nations, Article 1, pp. 685, 686, 687.

The eminent John Stuart Mill, whose work is the "classic" on political economy agrees with the "father of political economy" that the realty conveyance tax is direct in its nature.

" Of taxes on contracts, the most important are
" those on the transfer of property; chiefly on pur-
" chases and sales. Taxes on the sale of consum-
" able commodities are simply taxes on those com-
" modities. If they affect only some particular
" commodities, *they raise the prices of those com-*
" *modities, and are paid by the consumer. If the*
" *attempt were made to attack all purchases and*
" *sales, which, however absurd, was for centuries*
" *the law of Spain, the tax, if it could be enforced,*
" *would be equivalent to a tax on all commodities*
" *and would not affect prices;* if levied from the
" sellers, it would be a tax on profits, if from the
" buyers a tax on consumption; and neither class
" could throw the burden upon the other. If con-
" fined to some one mode of sale, as for example
" by auction, it discourages recourse to that mode,
" and if of any material amount, prevents it from
" being adopted at all, unless in a case of emerg-
" gency; in which case as the seller is under a
" necessity to sell, but the buyer under no neces-
" sity to buy, the tax falls on the seller; and this
" was the strongest of the objections to the auc-
" tion duty; it almost always fell on a necessitous
" person, and in the crisis of his necessities.

" Taxes on the purchase and sale of land are,

" in most countries, liable to the same objec-
" tion. Landed property in old countries is sel-
" dom parted with, except from reduced circum-
" stances or some urgent need; the seller therefore,
" must take what he can get, while the buyer,
" whose object is an investment, makes his calcu-
" lations on the interest which he can obtain for
" his money in other ways, and will not buy if he
" is charged with a government tax on the trans-
" action It has indeed been objected, that this
" argument would not apply if all modes of per-
" manent investment, such as the purchase of gov-
" ernment securities, shares in joint-stock com-
" panies, mortgages and the like, were subject to
" the same tax. But even then, if paid by the
" buyer, it would be equivalent to a tax on inter-
" est; if sufficiently heavy to be of any impor-
" tance, it would disturb the established relation
" between interest and profit; and the disturbance
" would redress itself by a rise in the rate of inter-
" est, and a fall of the price of land and of all se-
" curities. *It appears to me, therefore, that the*
" *seller is the person by whom such taxes, unless*
" *under peculiar circumstances will generally be*
" *borne.*

" All taxes must be condemned which throw ob-
" stacles in the way of the sale of land, or other
" instruments of production. Such sales tend nat-
" urally to render the property more productive.
" The seller, whether moved by necessity or
" choice, is probably some one who is either without
" the means, or without the capacity, to make the
" most advantageous use of the property for pro-
" ductive purposes; while the buyer on the other
" hand, is at any rate not needy, and is frequently
" both inclined and able to improve the property,
" since, as it is worth more to such a person
" than to any other, he is likely to offer the high-
" est price for it. All taxes, therefore, and all

> " difficulties and expenses, annexed to such con-
> " tracts, are decidedly detrimental; especially in
> " the case of land, the source of subsistence, and
> " the original foundation of all wealth, on the im-
> " provement of which, therefore, so much depends."

Concluding therefore upon this point, we respectfully submit that upon principle and in its very nature the tax is direct because imposed upon the power of alienation which is one of the three essential legal rights constituting property; consequently it must fall within the same category as a tax on the possession of property, or upon its income (enjoyment). The three taxes are necessarily in the same category, *i. e.*, direct taxes. This result is inevitable if the question is to be viewed from the standpoint of logic, of economics or of judicial precedent. We can appeal to no other standards.

POINT III.

Examination of the genesis and historical development of stamp taxes on conveyances of real estate in England and the United States.

In the standard work upon the history of taxation in England (Dowell), it is stated that stamp taxes originated in England in 1694, having been borrowed from Holland where they were imposed upon all legal documents. Dowell, Vol. II, p. 62.

> These stamp taxes were on royal grants of presentations to benefices and various instruments of that class, and also for a multiplicity of other legal instruments.
>
> " The tax contained the germs of the important
> " taxes on deeds of conveyance, settlement, mort

"gage and lease, probates of wills." Dowell, Vol. II, p. 62. Stamps became *not only a method of taxing legal instruments but a method of collecting taxes of various kinds, usually excises.*

"The meaning of stamp duties in this chapter "is limited to duties on documents and writings "having a legal operation or forming necessary "steps in suits in the law Courts, briefly, instru- "ments and law proceedings. Many taxes of "various descriptions have at different times, "some when first imposed, others subsequently, "by transfer from another branch of the revenue, "been placed, for purposes of administration, "under the management of the Commissioners of "stamps, and during their continuance in that "position have been termed 'stamp duties' or "'duties of stamps.' The taxes on horses, race- "horses, stage coaches, post horses, passengers by "railway, property insured from risk of fire, on "hawkers and peddlers, pawnbrokers, appraisers, "bankers, attorneys and solicitors, proctors and "conveyancers, publicans and tavern keepers; on "hats, gloves and mittens, hair powder and poma- "tum, cosmetics, proprietary medicines, choco- "late, cards and dice; on legacies and successions "of personal property on a death, and others "have been or are *stamp duties in this sense.* In "this work *these taxes* will be found under the "heads of taxes *on persons, on property* or some- "thing analogous to property, or on articles of "consumption notwithstanding the fact that they "may have been at some time unstamped 'duties "of stamps,' as taxes misplaced in the stamp "branch were termed in revenue language, or "'stamp duties upon matters or things' as they "are termed in several Acts of Parliament in "contradistinction to stamp duties upon instru- "ments." Dowell, Vol. III, 321.

The tax on a conveyance or deed was originally a fixed amount upon the number of folios used.

> "The duties were charged for every skin or piece "of parchment or paper upon which any instru- "ment was written, and in order to prevent any "curtailment of length with a view to avoid pay- "ment of the duties, deeds and writings were re- "quired to be engrossed and written in the man- "ner theretofore customary. *The tax was, there- "fore, to a certain extent a tax on the amount of "paper used.*" Dowell, Vol. III, 324.

In 1714 for the first time appears the principle of percentage tax on the amount of the transaction.

> "By this Act (1714) the duties on grants of money "and offices were increased by reference to the "amount granted and the value of the office. "This is interesting as the commencement of *ad "valorem* charges, that is to say, charges having "reference to the magnitude of the transaction as "opposed to the length of the instrument." (p. 326.) The deed duty was not, however, changed from an ordinary stamp tax to percentage tax. Although Pitt attempted to do so he failed.
>
> "In 1795 the duty upon deeds was raised to 10s. "an amount which was payable in respect of "every skin on which the deed was engrossed, the "number of words or folios to be written on a "single skin of parchment was still limited by "law and therefore *in principle the tax continued "to be a tax on deeds by reference to the length and "such had been up to this date the governing prin- "ciple of the stamp tax.*" *Id.* pp. 329–330.

The English Stamp Act of 1870 consolidating the various stamp duties imposes a percentage duty on conveyances on sale which is defined as "any instrument whereby any property upon the sale thereof is

legally or equitably transferred to or vested in the purchaser."

It thus appears that the development of the percentage or progressive stamp tax is a late one in English law and not until quite recently has it been applied to deeds or conveyances of sale. The question whether such a tax was not a direct tax did not and could not arise as a legal question in England as the English Parliament is, of course, bound by no limitations in this respect as is the Congress of the United States. The history of British taxation does not show the adoption of any definite rule or scientific classification of direct and indirect taxes. Dowell, for instance classifies taxes as follows:

> First. Taxes on persons, capitation or occupation.
>
> Second. Property, land, income, movable, death duties, property sold by auction and property insured.
>
> Third. Taxes analogous to a property tax, for instance, hearth-money, window tax, inhabited houses, taxes on domestic establishments, persons having horses, dogs, servants, guns, etc.
>
> Fourth. Stamp duties on legal instruments and contracts. Table of Contents, Vol. III.

In the United States this tax on real estate conveyances has never been imposed but once before. While the laws of 1797 (Chap. 11, Act. July 6th) as well as the laws of 1813 (Chap. 53, August 2nd) provided various progressive stamp taxes, taxes on bonds, promissory notes, etc., conveyances or sales are not included. It was reserved for the omnibus and omnivorous civil war tax law of 1862, 12 Stat. at L., 479, to lay a tax on

> " any deed, instrument or writing whereby any
> " lands, tenements or other realty sold shall be

" granted, assigned, transferred or otherwise con-
" veyed to or vested in the purchaser or purchas-
" ers, or any other person or persons by his, her
" or their direction."

It is thus evident that there is nothing either in English history or the practice of the government save the statute just mentioned which could serve as a precedent for contending, as has been contended in other tax cases in this Court, that long continued congressional or administrative usage should be considered as an element in determining the constitutionality of the tax.

In the *Fairbank* case, although the Acts of 1797 and 1813, as well as that of 1862, had provided for a tax on foreign bills of lading, the Court nevertheless held that such action on the part of Congress in no way precluded it from examining into the real nature of the tax itself and used the following language, which is even more pertinent to this tax, the sole legislative precedent for which is to be found in the tax of 1862.

" It will be perceived that these stamp duties
" have been in force during only three periods:
" First, from 1797 to 1802; second, from 1862 to
" 1872; and third, commencing with the recent
" Statute of 1898. It must be borne in mind also
" in respect to this matter that during the first
" period exports were limited, and the amount of
" the stamp duty was small, *and that during the*
" *second period we were passing through the*
" *stress of a great civil war or endeavoring to*
" *carry its enormous debt; so that it is not*
" *strange that the legislative action in this respect*
" *passed unchallenged.* Indeed it is only of late
" years, when the burdens of taxation are increas-
" ing by reason of the great expense of govern-
" ment, that the objects and modes of taxation
" have become a matter of special scrutiny. But
" the delay in presenting these questions is no ex-

" cuse for not giving them full consideration and
" determining them in accordance with the true
" meaning of the Constitution."

Fairbank v. *U. S.*, 181 U. S., page 311–12.

The above case held that a tax of 25 cents on bills of lading of goods intended for export, is a tax on the export itself, and therefore obnoxious to the constitutional restriction as to the taxation of exports. The reasoning of this case to the effect that form and not substance will be looked into is very apposite here.

Mr. Justice Brewer cites among other cases, that of *Brown* v. *Maryland*, 12 Wheat., 419, in which a licensed tax upon the importers of foreign articles was held to be in fact, though not in form, a tax on imports and therefore one which a State could not constitutionally levy. He quotes with approval the language of Chief Justice Marshall as follows :

" All must perceive, that a tax on the sale of an
" article, imported only for sale, is a tax on the
" article itself. It is true the State may tax occu-
" pation generally, but this tax must be paid by
" those who employ the individual, or is a tax on
" his business. * * * This the State has a right to
" do, because no constitutional prohibition extends
" to it. So a tax on the occupation of an im-
" porter is, in like manner, a tax on importation.
" * * * This the state has not a right to do, be-
" cause it is prohibited by the Constitution."

It is a misapprehension to assume as did the learned District Judge in the case of *Thomas* v. *The United States*, that *Brown* v. *Maryland*, the *Fairbank* case, and those of a similar class are cited by us as authority for the proposition that because a tax on an importer or an export bill of lading was held to be a tax upon an import, that by parity of reasoning a tax on a deed of conveyance, is therefore necessarily a

direct tax. It is not contended that any tax falling within the export prohibition clause of the Constitution is necessarily a direct tax. These cases are not cited, with any such purpose, but to show that the Court will look into the real nature of the tax whatever its form.

In this case a similar examination of the tax shows it to be a tax upon the power to sell, which is an integral property right, and by taxing which, property is directly burdened within the meaning of the words "direct taxes."

POINT IV.

Answers to objections and a consideration of the cases cited by the defendant in error as adverse to contention of plaintiff in error.

The objections which will probably be urged by the learned Attorneys for the Government in opposition to our position have been succinctly set forth by Circuit Judge Thomas in the case of *United States* v. *Thomas*, Fed. Rep., recently decided, upon the question as to the constitutionality of the tax on transfer of stock certificates. While some of the questions in that case have no bearing upon the case at bar by reason of the nature of corporate certificates many of the arguments used by the Circuit Judge in upholding the validity of the tax therein involved would apply, if sound, equally well to the tax here in question. His objections considered *seriatim* as stated, by him, are:

1. "The expressions in the cases where no tax was "valid, that a tax on vendors or occupations, or "shipping bills, was a forbidden tax on the com- "modities, would, if applied to instances where "the taxing power has been uniformly recognized, "vitiate the same."

This is based upon a misconception of the position of the plaintiff in error. While a tax upon a foreign importer is a tax upon the thing imported, and therefore invalid, we do not contend that a tax on the occupation of importers is itself a direct tax; it may be considered an excise or occupation tax such as has been imposed in England from early times and has been in force in the United States several times since the adoption of the Constitution. This distinction is pointed out by Mr. Justice Brown in his dissenting opinion in *Pollock* v. *The Farmers' Loan & Trust Company*, 158 U. S., 691. In that opinion he reviews the cases from *Brown* v. *Maryland*, 12 Wheat., 419, down to *Cook* v. *Pennsylvania*, 97 U. S., 566, with a view to indicating that the question there involved was not as to whether a tax was direct or not, but whether it in reality affected the prohibited thing, that is, imports, exports or interstate commerce.

We have cited these cases simply with the purpose of showing that this Court will examine the Constitution in the light of its plain meaning, looking at each question from the standpoint of substance rather than form, and not feeling itself in any way bound by congressional or administrative usage unless the question is in itself so doubtful or ambiguous as to make usage valuable as a make-weight in reaching a conclusion.

We state thus candidly our views as we do not desire to attempt to hold untenable positions but consider that the cases adverted to, while not directly deciding the propositions contended for by appellant, necessarily and logically sustain his reasoning.

2. The second objection formulated by the Circuit Judge is as follows:

> "In whatever form a tax is laid its payment "must be primarily from the taxpayer's prop- "erty. In this sense the same is the subject of "the tax."

This is a truism with which we have no quarrel. Every tax must fall ultimately on property, even a capitation tax, but the tax here in question *is levied directly upon the exercise of a right of property*, precisely as the tax found unconstitutional in the Income Tax cases was imposed upon another equally essential right of property, namely, the collection of the income or earnings of real estate or personalty.

3. Judge Thomas' third objection is that:

> " A statute providing for a direct tax with cer-
> " tainty burdens by lien or generally the tax
> " payer's property, and in theory appropriates *pro*
> " *tanto* his income and encumbers his principal,
> " while a statute providing for a tax on sales in-
> " terrupts no enjoyment of property, makes no
> " exaction from principal or income beyond
> " placing a tax upon a transaction attending the
> " disposition of property."

This objection seems to us to be unsound in its premise because a tax upon the power of sale necessarily encumbers the property. Should the power of sale be prohibited by law, property would certainly be much injured in value and would in fact cease to be property, so in a proportionate degree any encumbrance placed upon alienability must equally and progressively diminish the value of property (*vide* citations *Wynhamer* v. *Peo.*, *supra*). This seems to us too clear from the standpoint of ordinary deduction to require further comment.

4. The Judge's fourth objection is:

> " That the right to tax a pursuit, occupation or
> " business involves the right to tax the same in
> " whatsoever limited degree it is adopted and fol-
> " lowed, so that a right to tax one for carrying
> " on the business of selling shares of stock involves
> " the power to tax the sale of a single share of
> " stock."

This objection seems to us to radically ignore the basis of a business or occupation tax, which is in its nature a tax upon a license or privilege exercised by a certain class of persons. Probably the oldest occupation tax was that upon attorneys at law, and in the history of English and American taxation it has been extended to various other occupations.

> " A tax on the legal profession imposed, by Pitt,
> " in 1785, the same year as the taxes on shops and
> " pawnbrokers, formed one of the annual *license*
> " *taxes* he was at this date endeavoring to intro
> " duce into our fiscal system." Dowell, Vol. III, p. 20.

To hold that the owner of property by exercising one of its fundamental attributes thereby becomes a business man exercising a privilege or license and taxable on such, seems to us wholly fallacious. It ignores the pith of plaintiff's contention which is that any tax is direct which is imposed upon one of the necessary incidents of all property ; the mere exercise of any one of which is an ordinary attribute of ownership regardless of whether it be exercised as an incident to a trade or calling or merely for the owner's immediate gratification and support.

5. His fifth objection is :

> " That the right to lay an unapportioned tax on
> " sales is not limited to sales of commodities
> " whereby the tax may be shifted in whole or
> " in part, and the conflicting views of the econo-
> " mists should influence the legislature and not
> " constrain the courts."

A tax upon sales of ordinary commodities has never been considered by economists a direct tax upon property, because the consumer was thought to pay the tax. While economists may not be wholly in ac-

cord on this point, taxes on spirits, tobacco, salt, sugar, etc., have always been considered as falling within the category of excises or indirect taxes, and the question was so absolutely and definitely settled by the trend of English tax legislation, prior to the time of the adoption of the Constitution, that there could have been no question in the minds of the framers that the word "direct" taxes did not include such excises.

In the recent case of *Patton* v. *Brady*, the point was suggested that a tax upon a manufacturer of tobacco is in reality a direct tax in the meaning of the Constition, to which Mr. Justice Brewer answered:

> "But as we have seen, it is not a tax upon prop-
> "erty as such but upon certain kinds of property,
> "*having reference to their origin and intended*
> "*use.*"

6. The Judge in the Thomas case appeals to the legislation of 1862 as showing a similar instance of taxation. This objection has already been adverted to in a preceding point.

7. His seventh objection is that

> "taxes on sales or transfers of property are indi-
> "rect within the holdings of the Supreme Court."

He relies to sustain this view largely upon the case of *Knowlton* v. *Moore*, 178 U. S., 41, which held, that a legacy or inheritance tax was levied neither directly upon the property itself, nor upon the power of the State to regulate inheritances, but upon the act of transmission itself, or upon the consequence of death which is the generating source of the tax. This case can have no application to the case at bar, because the act of transmission is a privilege accorded by the State to the heirs or devisees of the dead man. Such a privilege is not a property right as understood within the meaning of the Constitution of the United States.

If the State abolished it, such law would not fall within the condemnation of XIV Amendment. *Magoun* v. *Illinois Trust Company*, 170 U. S., 283, and, consequently, the tax falls not upon one of the three essential attributes of property but upon the right or privilege accorded by the State to legatees or devisees, which right or privilege is a comparatively recent creation of municipal law and not a fundamental property right. While Mr. Justice White suggests that indirect taxes may be regarded as a tax on an act or event this rule could not apply to an act which is a necessary incident to mere ownership. *Knowlton* v. *Moore*, 178 U. S., 41.

The eminent President Hadley of Yale says in regard to direct and indirect taxes:

"There is no doubt that there is a real distinction between these two kinds of taxes; but there is a great deal of doubt whether the distinction just drawn (which is that of Smith and Mill) correctly marks the line between them. * * *

"In view of this difficulty, Continental writers have generally preferred to define direct taxes as those which are assessed on persons (or property) and indirect taxes as those which are levied on acts. This is correct enough in its practical applications. But *it fails to indicate any real distinction of principle and therefore in a considerable number of cases which can be regarded in either light* (*e. g. taxes on occupations*) *we cannot use the definition as a criterion.* We decide on unformulated grounds to which class a tax belongs and interpret our definition accordingly." (Economics, page 461).

8. The last objection is that the tax is difficult if not impossible of apportionment. This argument, however, would have applied quite as well to the income tax and was urged with great vehemence in that case but did not find favor with the learned Court.

Concluding, therefore, we contend that in its nature the tax is directly and really upon property; that there is nothing in the historical genesis or development of the tax to show that it has ever been considered otherwise; and that further the *Income Tax Cases*, *Nicol* v. *Ames*, and *Fairbank* v. *U. S.* cannot be reconciled with any other theory.

All of which is respectfully submitted to the Honorable Court.

November, 30, 1903.

FREDERIC R. COUDERT, JR.,
PAUL FULLER,
Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1903.

ROBERT A. CHESEBROUGH,
Plaintiff in Error,

vs.

THE UNITED STATES.

No. 152.

WASHINGTON, D. C., Thursday, December 3, 1903,
1.30 o'clock P. M.

The above-entitled cause came on for hearing at the above date and hour, the Chief Justice and all the Associate Justices being in attendance.

Present on behalf of the plaintiff in error, FREDERIC R. COUDERT, JR., Esq., and PAUL FULLER, Esq.
Present on behalf of the United States, MILTON D. PURDY, Esq.

Argument of Frederic R. Coudert, Jr., Esq., on behalf of the Plaintiff in Error.

MR. COUDERT: If the Court please, the statement of facts in this case is very simple. There is a point of Constitutional law involved here, and nothing else. The case comes before this Court on a writ of error, to the United States District Court for the Southern District of New York, sitting as a court of claims under the Act of Congress.

This is an action by the plaintiff to recover the sum

of $600 which was paid for the purchase of stamps, on a conveyance of real estate, under the War Revenue Law of 1898, under compulsion of the law, which threatened him with fine and imprisonment and the invalidity of the conveyance, if he did not pay the tax. The tax was paid, he sued to recover it back, after application to the collector and refusal to refund; the Government demurred, the demurrer was sustained, and as the case involved a constitutional question, of which this Court has jurisdiction—whether exclusive or not, I do not know—the case came here directly. Therefore, there is no question whatever of jurisdiction.

I do not wish to weary the Court by reading, but if they will look at the statute, on pages 1, 2 and 3 of the brief in this case, they will see the exact question of law here involved.

On page 1 the statute begins: "On and after the first day of July, 1898, there shall be levied, collected," and so on, "in respect of the several bonds, debentures, or certificates of stock, and of indebtedness and other documents, instruments, matters and things mentioned and described in Schedule A of this Act, or for and in respect of the vellum, parchment or paper upon which such instruments, matters or things or any of them shall be written or printed," &c.

That is the general clause that precedes the specific clauses imposing the taxes on the various instruments.

That was the general clause of the war revenue law that was mentioned and involved in Fairbank *v.* The United States, and in Nicol *v.* Ames. The particular schedule which we claim offends the Constitution, and upon which we base this case, is Schedule A: "Conveyance: Deed, instrument or writing whereby any lands, tenements, or other realty sold shall be granted, assigned, transferred, or otherwise conveyed or vested in, the purchaser or purchasers or any other person or persons, by his, her or their direction, when the consideration or value exceeds one hundred dollars," and so on. Briefly, it is one dollar a thousand, and of course, with large conveyances, the sum is very great indeed, and the tax

has mounted up to thousands of dollars in certain cases.

The statute provides: "That if any person or persons shall make, sign or issue, or cause to be made, signed or issued, any instrument, document, or paper of any kind or description whatsoever, without the same be duly stamped for denoting the tax hereby imposed thereon, or without having thereupon an adhesive stamp to denote said tax, such person or persons shall be deemed guilty of a misdemeanor, and upon conviction thereof shall pay a fine of not more than one hundred dollars, at the discretion of the Court, and such instrument, document or paper aforesaid shall not be competent evidence in any court."

And the next section goes on to say that, in addition to the criminal punishment and incompetency as evidence, the document, if not stamped, shall also be invalid as a transfer, which is equivalent, of course, to saying that no transfer of property, lands, tenements, or hereditaments is possible in the State of New York unless this tax is paid. The result is that either you pay the tax, or you are deprived of the property right of alienation.

There is a preliminary question which I have not adverted to in the brief, because I had not assumed that the Government would raise it, as it seemed to us to have no serious foundation. I will advert to that first and then discuss the constitutional question.

The Government, as I have just learned from the solicitor's brief, claims that as the plaintiff purchased the stamps and put them on the conveyance, that therefore that was a voluntary gift, and that the Court must assume that he meant to contribute that amount, in a charitable spirit, to the welfare of the Government of the United States. And there being no compulsion, so says the other side, he was therefore a volunteer, and it must be presumed, as a matter of law, that he wanted to pay it, and that he paid it from purely philanthropic motives.

Well, that view does not seem to me wholly a common-sense view. If he had not paid the tax, he could not have sold his property, because he could not have passed

title to it. No title company would have passed the title, and no purchaser would have taken it. And even assuming that he found a company unwise enough to pass the title, or a purchaser simple enough to take it without the stamps, he would then have been subjected to an indictment, a fine or perhaps imprisonment, for violating the statute. The conveyance would have been considered invalid, and he might have waited two or three years before the matter came before reaching this Court to see whether the law was Constitutional.

In the meantime he had the choice of losing the benefit of his property or of being prosecuted for crime unless he affixed the stamps.

The choice was not a very cheerful one, and most men would make up their minds very quickly to impose the stamp on the document, under the compulsion of the law.

This question, or one absolutely similar in principle, has been passed upon by this Court in the case of Swift *v.* U. S. in the 111th United States. In that case, the Court said that the statute prescribed the using of stamps, and that the parties were not on an equal basis; that a man must not necessarily interrupt his whole business, and lose all the value of his property, in order to avoid the inference that his payment was voluntary. The protest, as I understand it, in a case of this kind, would be without value, and a mere formality, because after all, protest is nothing but an indication that a man does not make a voluntary statement. The common law protest—not statutory protest—is purely evidentiary; nothing else. Where the statute says: "You have to go to jail or do a certain act," it cannot be presumed that a man must be forced to go to jail, in order to express his protest against a stamp duty or other requirement. Therefore we claim, on the common-sense view of the question, and upon the view which this Court has already taken in the Swift case, that this claimant had no option, and cannot be considered a volunteer. We say that such a result would be harsh and arbitrary, and in addition, that it

would be opposed to the ordinary jurisprudence of this and other courts.

Therefore, the question that arises is simply this: Whether a tax upon a transfer of all real estate, regardless of time, place or manner, is a direct or an indirect tax, within the meaning of the Constitution. If it is a direct tax, the statute is unconstitutional, because the tax was not apportioned. And we claim that it is a direct tax. We claim that it is clearly a direct tax, and I will state here the propositions upon which we base that argument. If I seem to be a little elementary in analyzing the elements which comprise all property, I will have to rest upon the saying of Lord Coke, "Melius est petere fontes quam sectari rivulos"—"We had better go to the sources rather than follow the by-streams."

What is property? As I understand property, it is a volume or bundle of rights which the law gives or secures to the owner. The mere physical possession of a thing, outside of the law, gives a man no rights whatever. The hut that the primitive Aryan occupied might have been taken away from him at any moment, if some other primitive man with a stronger arm had come along. But, gradually, the community enveloped that possession in a kind of protection, and the hut which he had originally occupied became property, and it could not be taken away from him. Why? Because the community willed that it should not be.

This evolution of the ages, which has resulted in what we to-day term property, makes of property a bundle of rights and correlative duties. What are those rights? As I understand them, they are: the right to possession, that is, the elementary right of property, on which the others are based; the right to the income, or yield, from that possession, and the right to transfer that property to another; in other words, alienability *inter vivos*. Take away any one of those elements, strike out any one of them, and what we term property, what the Constitution of the United States terms property, ceases to exist as such. It becomes something different. It may resemble the more primitive form, so that it might have

been considered property ages ago; but to-day, if one of those elements were removed, property, as such, as known to the law, would cease to exist, and we would revert more or less to an earlier and more barbarous conception, in which a man had no full right to property as known to our law.

Therefore, I say, anything that detracts from or falls upon and directly and irrevocably affects possession, income or alienability, strikes property; there is no escape from it.

I contend, as our fundamental proposition, that a tax upon a transfer of real estate is a tax upon the real estate itself,—a direct tax. Why? Because it strikes alienability,—one of the rights to property. A tax on a man's possession, that is, on the ownership, as such, by reason of possession, is a direct tax, as has been held, and is, of course, perfectly clear, under the decisions of this Court. A tax on the income of property, the second element that goes to make up the bundle of rights which we call property, is a direct tax, because the income is an inseparable part of the property. Strike the income, and you strike the property.

Therefore, as a necessary corollary to those two principles about which there is no question, a tax on the alienability of that property, the third element of the bundle, is a tax upon the property itself, because you cannot conceive of property, under American law, without the right of free transfer *inter vivos* which is granted by the Constitution.

We claim, therefore, that upon principle, considered as an original question, in the view of logical, legal and economic principles, that that tax is and must be a direct tax. There are no considerations which we can invoke other than those which are either legal, logical or economic.

It is a direct tax on principle, because it is a tax on one of the three necessary elements of property.

There was a case some years ago in the State of New York, in which a law of the legislature of the State prohibiting the sale of liquor was held to be unconstitu-

tional, because the court said: If you take away the power to sell the liquor, you take away its value. You cannot take away that element, without destroying the property. As soon as you do that, it becomes valueless, or almost so. You might as well take away the possession, or the income from the property, as to take away the right to sell it. It is a direct attack upon and it is a direct destruction of property. (Wynhamer *v.* The People, 15 N. Y.)

There the power of alienability was absolutely held to be a part of the property, which you could not touch or affect without affecting the property.

Is there anything in the jurisprudence of this court, is there anything in the history of English or American law, that would militate against such a conclusion as that? It seems so plain, so obvious, so necessary, that we are brought very quickly to the consideration of the question whether there can be any rule of law to the effect that a tax on possession and income are direct, while a tax upon alienability is indirect.

Has the law reached so logically anomalous a result, so impossible a result? If it has, we bow to the majesty of the law, and say that if the question has been adjudicated, we can say nothing further. Let us, therefore, examine the authorities and see whether that is the case.

As I understand it, the conception as to what is a direct tax, within the meaning of the Constitution, must be determined by an examination of what the framers intended by the words "direct tax." If they had a definite coherent intention in their minds, that is the intention that this Court will enforce, and no other. Therefore, with a view of obtaining the intention of the framers on that point, of getting at what was in their minds when they said "direct tax," of finding out what idea they had as to what particular taxes were included in that category, I have examined in my brief somewhat fully the history of the English law as to this particular tax. I will not go into it fully now. I

will not weary the court with it, or with any of the citations from the historic writers, but the point about it is this: that in the English law, this tax upon deeds of real estate was a peculiar tax. There is little or no analogy to it in the other taxes, the usual excise or stamp taxes.

The first tax, a tax upon deeds of real estate, was about 1704. A certain amount was required to be paid on each deed. It was a fixed amount. The conveyance might be for a hundred thousand pounds or ten pounds, but the amount of the tax was fixed. It was clearly and absolutely a stamp tax, a tax on the parchment, or vellum. It was one of the taxes that had been brought over from Holland during the long struggle with France, when England needed money, and began to tax everything. They adopted the Holland system, and taxed all legal instruments, all instruments to which the law attached a legal sanction. They taxed deeds; so much for every deed.

Then, about the middle of the eighteenth century, came a slight modification. They wanted more money, so they proportioned the tax, not to the amount of the property transferred, as is done in the law here, but to the number of skins going to make up the deed—ten shillings a skin. Then, lest ingenious lawyers would shorten the deed too much, they enacted that the form of deeds must not be changed. They went on and collected the tax in that way down to a period subsequent to the adoption of the Constitution. A little before 1800, Pitt introduced a bill to proportion the tax to the amount of property involved. That was a principle that had been adopted about 1794, as I remember it, by which, in certain cases,—benefices conveyed by the king, advowsons, and so on—the tax was proportioned to the amount involved in the transaction. And, as Dowell says in his History of Taxation, this was a new principle that had come into the English law of taxation, from Holland—*ad valorem* taxes.

That principle, however, was not applied to deeds.

Pitt's attempt to make it applicable to deeds failed,—why, I do not know. I can find no record in the debates on the subject, but he failed, and the old tax on deeds, at so much a skin, which was a true stamp tax, a tax literally on the parchment or vellum, proportioned to the amount of the parchment and vellum, remained in force for a very long time—when finally Parliament applied the *ad valorem* principle to conveyances, and the English law now is virtually the same as the law of 1898 here in question.

Therefore I contend that the history of the English law shows that the *ad valorem* principle was a new and rather recent one; that there is nothing whatever in the English law to show that the English parliament, or the English law-makers, considered that this particular tax—I am not speaking of any of the other stamps, or excise—was not a direct tax upon property.

Of course, in England they have never endeavored legally to make any distinctions between direct and indirect taxes. They tax everything. As Sydney Smith said, speaking of the long struggle with Napoleon, they taxed everything that a man put on his back, everything that a man put in his mouth, and everything else. There was no legal or constitutional restriction. There was no legal term which classified direct taxes. When the taxes were commented upon by text-writers, some of the taxes would be considered by one writer as direct taxes, and by others would be considered as indirect taxes in accordance with the view taken by the writer of what was really an economic question. There was no legal criterion by which to judge of the taxes as to whether they were direct or indirect.

What, then, was the criterion under the English law? Because, if we get the English law criterion as to direct and indirect taxes, at least if we get the canon of construction which they had in their minds at the time of the adoption of the Constitution, we can come pretty close to finding out exactly what the framers of the

Constitution meant, because they were familiar with English law, and with any politico-economic feature of it. Hence if we can find that out, we can get their conception of what was a direct tax and what was an indirect tax.

As I have said, there was no legal conception, no legal definition of direct and indirect taxes, and the term, after all, is not a legal term at all. The taxes were invented before the scientific theories classifying them were thought of. The taxes were in existence before the economists invented the classes, and the terms "direct" and "indirect" taxes.

Therefore, the distinction was and must have been mainly an economic concept.

The Court thereupon took the usual recess.

AFTER RECESS.

MR. COUDERT: If the Court please, when the Court took the recess, I was asking how we were to obtain any rule by which to judge of what were considered direct taxes by the framers of the Constitution. I took the English law and showed that there was no scientific classification in the English law, and that none was necessary.

Dowell, the historian of English taxation, classifies taxes as (1st) taxes on persons, capitation or occupation; (2d) taxes on property, land, income, movable, death duties, property sold by auction, and property insured; (3d) taxes analogous to a property tax, for instance, hearth-money, window tax, inhabited houses, taxes on domestic establishments, persons having horses, dogs, servants, guns, hair powder and wigs, in a class by themselves. Then he makes a fourth classification of stamp duties on legal instruments and contracts.

There is no attempt at scientific classification whatever.

There was thus no legal classification of taxes at the

time of the adoption of the Constitution. Now, what was the distinction between direct and indirect taxes based on? It was based upon something. There must be some rules by which we can ascertain that. If one had asked the first man he met on the street what a direct or indirect tax was, he in all probability would have obtained no answer. There was no public opinion on the subject, no fixed public views on the question of direct or indirect taxes, and therefore the only persons who had thought about the matter, who had endeavored to make the distinction between direct and indirect taxes, were the economists or thinkers who wrote on general public law questions.

It is always difficult to trace the history of an opinion—but this question was certainly one of class opinion—the opinion of a small body of experts who invented the distinction or fixed its meaning.

I have no brief from the economists. A great many things have been said about the economists, and their different views as to the shifting incidence of taxation and so on; but, as a matter of fact, at the time the Constitution was adopted, in England and the United States there was no definite criterion whatever between direct and indirect taxes, except that of the economists. It was an economic rather than a legal classification.

Therefore, in order to find what a direct tax was, or an indirect tax, we have to go and find out what was generally the meaning of those terms among the class of persons who might be denominated economists and thinkers on politics.

I now revert to the history of this particular tax. In the United States, this tax on deeds of conveyances of real estate has only been enforced once. The early taxes, so-called excises and stamp taxes, of 1797 and of 1813, did not contain any clause taxing the alienability of real property. The only instance of this tax that we have is in the general, omnibus and omniverous revenue law of 1862, which taxed everything, under the stress of Civil War. This tax was not there apportioned.

That is the sole instance that we have in our history, of this tax on conveyances of real estate. That, of course, cannot furnish any precedent by which this Court would be guided in the interpretation of the question as to whether this was a direct or an indirect tax.

Referring to taxes on export bills of lading, which are found three times in our legislation, 1797, 1813 and 1862, this Court, speaking through Mr. Justice Brewer, said that the fact that those taxes had been imposed three times by Congress was no reason whatever for the Court considering the taxes constitutional. I cite from what he says: "Indeed, it is only of late years, when the burdens of taxation are increasing by reason of the great expense of government, that the objects and modes of taxation have become a matter of special scrutiny." And he says that it is indifferent that for a hundred years those taxes have been at various times on the statute books, that the Court will look into the real substance of the question and determine whether they are constitutional or unconstitutional, and if they are clearly unconstitutional, as was the export bill of lading tax, the Court will settle that question without reference to the statute. (Fairbank case.)

How much stronger is the case here, when, instead of having instances spreading over a hundred years, we have only one exceptional instance in our history of this particular tax, which only endured for three or four years, and which was imposed during the stress of the Civil War, when everybody paid every tax, out of patriotism, and when nothing was questioned.

So that, in our law, there is absolutely no real precedent from which we can say that the intention of Congress, or that the trend of legislation and administrative practice was to consider taxes on the alienability of real estate as indirect taxes. Consequently, neither the English law nor American legislation have determined this question in any way, or affected it in any way whatever. Therefore, unless there are some decisions of this Court

the other way, this Court will take up the question and look at the fundamental nature of the tax to determine whether it be a direct or an indirect tax within the intention of the framers and the meaning of the Constitution.

JUSTICE PECKHAM: Would the same practice apply in regard to putting on a stamp for the sale of personal property?

MR. COUDERT: It seems to me, if your Honor please, that if the stamp were placed by law upon all sales whatever of personal property, without any regard to time or place, as your Honor said in the case of Nicol *v.* Ames, not upon a sale at a particular place, but upon all sales generally, without regard to time or place, that would be a tax upon the power of sale, a necessary incident of property, and therefore a direct tax. I think that is quite clear, from a logical standpoint, and I think it is indicated in Nicol *v.* Ames, to be the real substantial distinction.

JUSTICE PECKHAM: Therefore, the law providing for a stamp in connection with those sales of personal property would be void?

MR. COUDERT: As far as it relates to *all* sales. There are a number of provisions—a tax on the privilege of auction sales, or shares of stock——

JUSTICE PECKHAM: But I am speaking of taxes on sales of personal property.

MR. COUDERT: They would be void, and be quite analogous to the income tax imposed upon the corpus of all personal property, which was considered to strike the income, and therefore the property itself.

JUSTICE WHITE: How would it be with a tax on bank checks and drafts? Is not that, under your theory, a tax imposed on a transfer of just so much money?

MR. COUDERT: I am glad your Honor asked that. I think that that is somewhat different. Those are also taxes imported into England from Holland. They were taxes on legal instruments—promissory notes and drafts, judicial documents and so forth, and they were looked

upon as, in the first place, pure stamp taxes, taxes on the parchment or vellum. Then they were also taxes on instruments which the law had given, as a privilege to the individual to use. I think that, for that reason, those taxes are entirely distinguishable from taxes which every man, as mere owner, must pay. It is only the man who chooses to avail himself of the privilege of using a promissory note, and the particular advantages that are given to negotiable paper by the courts and the law, who is properly subject to the tax. They have been always considered true stamp taxes. Such taxes are not upon property at all but upon the use of certain instruments invested by the law with peculiar advantages. A man can dispense with a check book; he cannot enjoy his property and really own it if prohibited from transferring it, and I do not suppose that there was very much doubt in the minds of the Framers at the time of the adoption of the Constitution that such taxes were indirect taxes, and properly stamp taxes. Opinion seems to have been quite settled on that point.

JUSTICE WHITE: You have already said that you must determine what was in the minds of the framers by going to the economists.

MR. COUDERT: I was going to that point.

JUSTICE WHITE: The answer, therefore, is to go to the economists, and not to go to see what the framers thought.

MR. COUDERT: But what they thought was largely predicated on the economic thought of the day.

JUSTICE WHITE: Then it is a question as to what the economists thought, and it is a question whether they did not think that a tax on the instrument of sale of personal property, or on a check, or a draft, was a direct tax.

MR. COUDERT: The economists have said that any taxes of that kind, taxes on particular commodities, or on particular sales of particular property, are almost always shiftable; that the incidence of the tax was shiftable, and I have cited in my brief Adam Smith,

"the father of political economy" whose writings were in the minds of the framers at the time of the adoption of the Constitution, as the Court has said in the income tax cases.

JUSTICE WHITE: Take the case of a bank check. Is that shiftable, in the sense meant by the economists? That is the question that was put to you. Have you any statement from the economists to show that if I should draw a check to A to which I must affix a stamp of five cents, that I can shift the burden to the man to whom I give the check?

MR. COUDERT: I answer, as far as those instruments are concerned, the question as to shifting is indifferent. In England, for instance, a tax on parchment was always construed as a true stamp tax. That is, the tax was upon the material making up the instrument itself.

This Court has differentiated—as your Honor's question reminds me—between a true stamp tax and a tax on the property itself. In the Fairbank's case, it was held that a tax of 25 per cent. on a foreign bill of lading was a tax on the export itself; that it was a fiction and a subterfuge to call it a tax on the parchment or vellum. The minority did not take that view. They said that it was a true stamp tax, in respect of being a tax on the parchment or vellum. Mr. Justice Harlan, in delivering the dissenting opinion, said that if this tax had been of a large amount, say five thousand dollars, or if it had been an *ad valorem* tax, then the case would have been different, and the tax would have been not a true stamp tax on the parchment or vellum, but a tax upon the export. That case differentiated very clearly the difference between a true stamp tax and a tax levied under the guise of a stamp tax.

Dowell, in his work on Taxation, says a great many taxes that were not true stamp taxes at all were classed as such because they came under the jurisdiction of the commissioners of stamps, the stamps were only a method of collection. He says, however, that they were not true stamp taxes, at all. Direct taxes, indirect taxes,

property taxes, taxes analagous to property taxes, or true stamp taxes may all be collected by a stamp duty.

For instance, they had many years ago in England, a tax which was the cause of much Parliamentary discussion, on all papers issuing from the courts, on all orders and judgments and so on, a tax such as they have in France to-day; that was considered a stamp tax, a tax upon a piece of paper to which the law gives a certain privilege or advantage, or opportunity. But a tax on *all* sales, wherever made, is a tax on all property directly and besides its incidence cannot be shifted, and it is therefore a direct tax.

I was going on to say that bearing in mind the economic view, and the condition of the English law, we come to the question as to what is the criterion of a direct tax, as defined by this Court.

The Attorney-General has been kind enough to furnish us an abundance of citation in his brief in the Thomas case, and there is there an excellent definition of a direct tax. It is sound and scientific, and, what is more, it satisfies the purposes of this case admirably. I read from the appendix of the defendant in the Thomas case, the colloquy between Mr. Edmunds and Mr. Justice Brown.

"Mr. Justice Brown (addressing Senator Edmunds): Is not the distinction somewhat like this: that direct taxes are paid by the tax-payer both immediately and ultimately; while indirect taxes are paid immediately by the tax-payer and ultimately by somebody else?

"Mr. Edmunds: Yes, sir; that is a much clearer definition than I have given, though I think the whole burden rarely falls on the last man. It is, I think, borne partly by each agent in the movement."

That was exactly the notion that the framers of the Constitution had in their minds at the time.

Some economists may have said that this thing was a direct tax, and others that the same thing was an indirect tax. But there never was the slightest difference between the economists as to the fundamental principle

that a tax which could not be shifted from the person who originally paid it to the purchaser was a direct tax.

I am not defending the economists, but I say that their criterion was a perfectly clear one. The difficulty was in its application, just as much so as the so-called law of torts in the State Courts is hopelessly confused; yet the law is perfectly plain and could be codified in half a dozen pages, but its application and its misapplication to particular cases takes volumes of reports to state.

It is somewhat the same story with the economists. As Mr. Justice Brown says, the distinction is perfectly clear. The difficulty is to find which particular tax answers to the general principle. That principle is the touchstone.

JUSTICE BREWER: Before you finish your argument, I wish you would indicate what you think a man must do to make a voluntary purchase of a stamp tax, or payment of a stamp tax. I do not wish to interrupt you at this moment, but would like to have your statement on that before you finish.

MR. COUDERT: I will take that up now, if your Honor pleases. I am not bound to any particular order of argument.

JUSTICE BREWER: I would like to know what he must do to make a voluntary payment of a stamp tax. You say that this was not a voluntary payment in this case, and I would like to have you state what you would consider a voluntary payment.

MR. COUDERT: The internal revenue statute provides that he shall appeal to the collector, or, rather, to the Commissioner of Internal Revenue, for a refund; and possibly if he did not appeal to the Commissioner of Internal Revenue within two years, as the statute prescribes, the Government might say that he has lost his right by the Statute of Limitations, the lapse of time indicating his willingness to pay. As far as the making of a voluntary payment is concerned I cannot imagine his doing so, unless he filed with the proper

officer of the United States a statement that he was not paying the tax under compulsion of law, but that he was anxious to donate the amount to the Government as a charity.

JUSTICE HARLAN: Who is the proper officer?

MR. COUDERT: The Commissioner of Internal Revenue. These taxes are sold at every drug-store, and the purchaser of the stamp——

JUSTICE HARLAN: Then, if a man lived in Denver, he must send a letter to the Commissioner of Internal Revenue?

MR. COUDERT: If your Honor please, I do not say that he must; I say that he has, in this case, and as far as that is concerned, the question of compliance with the Internal Revenue law is not in the case.

I think myself that if he made the payment and did not appeal to anybody, it would still be money that was taken from him by force of an unconstitutional law, and he could get it back by suit without preliminary formality.

JUSTICE HARLAN: Suppose he bought the stamp, and had no piece of property to put it upon, or no deed of conveyance?

MR. COUDERT: The stamps had a value. Now, whether he used them before he had the intention or not, he was using up valuable property, expending his money, and expending it under compulsion of the law.

JUSTICE BREWER: And you say that the man could recover the taxes, on the ground that the statute is illegal?

MR. COUDERT: Yes, sir, and that a voluntary payment must be indicated by facts showing a lack of compulsion, as this Court has held. I did not go into that fully, because it seemed quite obvious that this case was quite different from Customs cases; for instance, take the case of a man coming into the Custom House, coming into personal contact with the officers of the law, who virtually say to him: "If you do not do so and so, we will detain you;" if he simply indicates dis-

pleasure, in writing or orally, that is a sufficient protest to negative any supposed intention to donate the amount of the tax to the Government. Here the statute says simply that if you do not pay the tax you cannot transfer the property; you cannot sell the property; it may become of no value to you. If you do sell, you become a criminal.

JUSTICE BREWER: The law does not say that he cannot sell.

MR. COUDERT: But looking at it as a fact, he cannot sell it, because no purchaser would take it and no title company would pass the title.

JUSTICE BREWER: Is the Government responsible for what the title company sees fit to demand?

MR. COUDERT: The Government is responsible for putting a man under the necessity of paying the tax or losing the value of his property. All inference of voluntary payment is thus negatived. It seems to me that it sums itself up in this way: The law said: "If you make a transfer without paying that tax, you go to jail." Is a man bound to go to jail as a protest against a law of this kind? As you said in the Swift case, he is not even bound to interrupt his business in order to prove unwillingness to pay. The law says that if he does not do a certain thing he will be criminally punished, and he need not interrupt his business, need not make his property valueless, by holding it and not transferring it. He can transfer it and sue the Government to get the tax back. There is such a thing as compulsion of law. He has the whole United States Government and its machinery against him, and it is quite conceivable that he would not wish to subject himself to an indictment in order to prove that he was not making a voluntary payment. It is only an evidentiary matter, as to whether it was voluntary or not. There is not any technical rule of law which can force us to construe this as voluntary. Cases are looked upon on their own merits. If a man comes through the Custom House and does not make any protest whatever the col-

lector is justified in paying the money over to the Government. He came in contact with the collector, and did not evidence to that officer that he objected to the payment. But, what could a man do here, more than ask for the money back after he had paid it?

The internal revenue law says: "All claims for the refunding of any particular tax alleged to have been erroneously or illegally assessed or collected, must be presented to the Commissioner of Internal Revenue within two years after the cause of action accrued."

I do not know whether that statute applies or not. Out of an abundance of caution, we have brought ourselves within it by complying with it, and have asked the Commissioner of Internal Revenue for a refund, and he has, of course, refused it.

I say that it would be an impossible proposition to say that a man was forced to go to jail, or otherwise be assumed to have been actuated by a desire to donate the money to the Government. The Court is not dealing with fictions. And the statement I have made is in accordance with the doctrine laid down in the Swift case.

I do not know whether I have answered your Honor's question fully. I have done so as fully as I now can. I shall possibly file a supplemental memorandum citing the two or three cases covering the subject.

The law says that any person or persons who shall make a transfer, &c., without having the instrument of transfer duly stamped, "with intent to evade the provisions of this Act, shall be deemed guilty of misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding fifty dollars, or by imprisonment, not exceeding six months, or both, in the discretion of the Court, and such instrument, document or paper not being stamped according to law, shall be deemed invalid and of no effect." The law strikes at the validity of his conveyance, and imposes a fine or sends him to jail, or both.

It seems hardly reasonable to suppose that a man must

risk six months in jail, besides a fine, in order to indicate as a matter of evidence satisfactory to the Court and the government, that he is paying the tax under stress or compulsion.

This clause of the law seems to me to have considerable coercing activity on its face.

When I took up the question of voluntary payment I was speaking of the criterion by which we were to judge of what taxes were indirect and what taxes were direct. I read Mr. Justice Brown's definition, which seemed to me to cover the case quite adequately, and I would also like to refer to the criterion laid down by this Court, which has now passed into the jurisprudence of the Court and fixes the law, I mean that indicated in the Income Tax cases. I will read from the book: "The first question to be considered"—I read from the opinion of the Court—"is whether a tax on the rents or income of real estate is a direct tax within the meaning of the Constitution." That is the question here, precisely. "Ordinarily all taxes paid primarily by persons *who can shift the burden upon some one else, or who are under no legal compulsion to pay them,* are considered indirect taxes; but a tax upon property holders in respect of their estates, whether real of personal, or of the income yielded by such estates, and the payment of which cannot be avoided, are direct taxes."

That is the criterion laid down by the Court. I am not speaking now of Adam Smith, however dignified he may be, or of John Stuart Mill, or any political economist, but of the opinion of this Court, laying down the criterion by which we wish to have this case adjudged. It adopts the definition which was in the minds of public men in England and the U. S. at the time of the adoption of the Constitution. In other words, it grafts on the law an economic classification—that classification thus legally consecrated becomes fixed, immutable.

The next paragraph of the opinion reads:

"Nevertheless, it may be admitted that although this definition of direct taxes is *prima facie* correct, and to

be applied in the consideration of the question before us, yet that the Constitution may bear a different meaning, and that such different meaning must be recognized. But in arriving at any conclusion upon this point, we are at liberty to refer to the historical circumstances," and so forth.

We have now gone thus far, that the criterion to be looked at is that laid down here by the Court, unless there is something in the law that overthrows that definition, and makes the classification between direct and indirect taxes purely arbitrary, then that definition, and that suggested by Mr. Justice Brown, must apply to the case at bar.

Let us see whether the Court has, since deciding the Income tax cases, established any arbitrary rule which bars us out, and holds this particular tax to be indirect.

There are three cases, and three only, it seems to me, that have any pertinency here. If there are any others, they are mentioned in these cases. I will take them up *seriatim* and see whether there is anything there overthrowing the doctrine of the income tax cases.

They are, first, Nicol *v.* Ames. The Court is so familiar with its own jurisprudence, that I do not care to go into these cases in detail, but merely to state the exact decided point, which was in that case that a tax upon the privilege of sale at an exchange was not a tax upon the sales themselves, but was a tax upon the privilege of sale, and properly considered as an excise or indirect tax.

JUSTICE PECKHAM: Suppose the tax is not on the property, but on the sales thereof?

MR. COUDERT: Then these cases do not apply. Your Honor has most clearly indicated the distinction between the two classes of cases. You considered Brown *v.* Maryland inapplicable because the tax was not on property, but on a privilege which might or might not be availed of.

In the language of the Court a tax upon the privilege of selling property at the exchange dif-

fers radically from a tax upon every sale made in any place, of course. That is a peculiar kind of tax, on a particular privilege, not necessarily and inherently upon property, which is guaranteed to every man by the Constitution, and the tax upon that privilege is a perfectly proper tax in the nature of a license tax.

That is the differentiation which seems to us to differentiate this case now at the bar from these other cases, and to indicate the true distinction: "Direct taxes, in a general and large sense, may be described as taxes derived immediately from the person, from real or personal property, without any recourse therefrom to other sources for reimbursement." Income tax cases.

Then comes the Fairbank case. The other side have misinterpreted our position as to that case, and all of those cases dealing with the export clause of the Constitution.

We do not say that because a tax of some kind has been held to fall upon an export that such decision necessarily determined that the tax was a tax on the thing itself, and therefore a direct tax. Not at all. All we contend is that the doctrine of those cases is that if the tax is imposed upon an exporter, or upon a bill of lading necessary for the export of the goods, that the Court would not look at any fiction, but would go right to the facts and say, That is a tax upon the power to export. We use those cases as showing that what this Court will do is to look into the real, intrinsic, inherent nature of the law and its operation, and will determine whether the tax is really falling on the thing exported, or whether it is really a direct tax falling directly upon property, or whether it is an excise tax, or a true stamp tax, one of the many taxes that have been held to be indirect taxes, and which are really in their nature indirect taxes.

Therefore we cite those cases for that simple purpose, and we cite Nicol *v.* Ames case as differentiating between the tax upon the privilege of selling at a particular place from a tax upon every sale wherever made. The latter is our case.

There is one other case that perhaps I should not omit

to mention, because it is mentioned, and I think relied upon, by the other side. It is Knowlton *v.* Moore.

The rule that is there laid down, as I understand it, is, that an inheritance tax, viz., a tax on property in process of transmission from the dead hand to the living, is not a direct tax; that it does not strike the property; that it strikes the act of transmission, which is a privilege accorded by the law.

The theory of that tax is based upon the doctrine, or rather the practice of the French administrators and the French administration, and it cites the French tax regulations. The French rule is that a tax is a direct tax which is imposed upon property, and the ownership of property, but a tax which is imposed upon some transfer or some act, a legal act or otherwise, is classed as an indirect tax.

There is nothing in the French law that makes the classification. It is simply the French administrative practice, and while it may be perfectly proper to apply the French administrative practice, which economists—the great French economist Leroy Beaulieu, and Mr. Hadley, of Yale, and others—contend is a mere practice that is absolutely unsound, as far as any difference between direct taxes and indirect taxes is concerned,—it does not apply to alienability of property, and for this reason that alienation *inter vivos* belongs to the natural or fundamental law, which is that which is protected by the Constitution. The heritability of property, its transmission by testament, is not a necessary part of property. As I understand it, and as it was held in Magoun v. Illinois Trust Company, 170 U. S., the State could take away the right to transmit property by will, and say that the property should escheat to the State; that property terminated at death, and never passed to those to whom the testator desired to have it go.

Justice McKenna: That was the contention made in that case, but this Court did not pass upon it.

Mr. Coudert: I thought it laid down that doctrine. I may be mistaken, of course.

JUSTICE MCKENNA: My recollection is that the Court passed that proposition.

MR. COUDERT: They passed on the question as to the tax on the inheritance, and it was claimed that there was a right in the State to regulate inheritances. The doctrine of the case, as I remember it, was that heritability and testacy were privileges accorded by the law, and that those privileges were not necessarily and inherently property; that the State could tax them to any extent it saw fit.

JUSTICE WHITE: Why may not this tax be sustained on the theory that it is a tax not upon the property itself, but upon its transmission from one to another?

MR. COUDERT: I am glad your Honor mentioned that point, because I would like very much to make it clear, if I am able to do so. I have given that distinction some thought. That is the doctrine laid down in the case of Knowlton *v.* Moore. I have no quarrel with that doctrine, as far as it relates to intestate or testate succession, because I claim that property after death—the transmission of it—is a mere privilege accorded by the State, and I claim that if a State should destroy the right of heritability, or of testacy, that such a law would not be a taking of property, within the Constitution; that when the Constitution consecrated property, and fixed its meaning by protecting it, it meant property, its possession, income, and alienability *inter vivos;* and such was the American conception of property protected by the Constitution; when you strike that by a tax, then that is a direct tax, and you cannot possibly get away from it by saying it is on transmission.

In the inheritance cases, on the other hand, the inheritance is a privilege not protected by the Constitution; which each particular State accords to its citizens, and if that were taken away, it would not be a deprivation of property; and therefore it is properly a tax upon a privilege.

JUSTICE BROWN: Conceding the accuracy of the definition given by Senator Edmunds in the income tax case, in reply to my question, might not this be con-

sidered a tax upon the grantee, as well as the grantor? And it is very possible that the grantor may have fixed the price of the article—whether it be real estate or personal property—having the stamp taxes in view.

MR. COUDERT: If your Honor please, I was fearful of that when I first took up the case, but I found much comfort from an examination of the authorities. I went to Adam Smith, and found that he considered a tax on conveyances clearly fell upon the seller of the property. I found that John Stuart Mill, the classic political economist, took the same view, as did practically all the economists, both those in existence and cited as authorities at the time of the formation of the Constitution, and those subsequent to that date. I am glad you indicated the point. I might have forgotten to mention it. I have given full citation on it in the brief.

The economists seem to be a unit upon that, so that it is economically true that the tax cannot be shifted, that it is just as direct a tax, as was the income tax, or the tax on land as such.

The tax on the inheritance of property is a different thing. As I understand the doctrine of the Perkins case (U. S. *v.* Perkins, 163 U. S.), if a man dies and there is an inheritance tax, what does his heir get? His heir gets—not the property called C, we will say—the property he dies seized of—but he gets another thing; he gets "A," which is the property C minus the tax. The tax is deducted as a condition of his receiving that property under the laws of the State. He receives the property minus the tax, and on the death of the individual the amount of the tax goes by law direct to the State.

That is entirely different from a transfer *inter vivos*. The disposition after death is a privilege which the law accords to a man upon the condition of his paying so much; it might be fifty per cent. of the inheritance, which is taken away by the State.

In this view, it was said in the case of the United States *v.* Perkins: "The so-called inheritance tax of

the State of New York is in reality a limitation on the power of the testator to bequeath his property to whom he pleases; a declaration that, in the exercise of that power, he shall contribute a certain percentage to the public use."

In other words, that the right to dispose of his privilege by will shall remain, but subject to the condition that the State has the right to impose a tax upon its transmission. "Certainly it would be true that the right of testamentary disposition is purely statutory" and by purely statutory is meant that it is not protected by the Constitution, not an integral and necessary portion of property—"and the State has the right to require a contribution to the public treasury before the bequest shall take effect."

That is the idea I was trying to express in less adequate and correct language than is used in the quotation.

For that reason, I say that the tax imposed in the case of Knowlton *v.* Moore was a tax on the privilege of transmission. It was a tax upon property, which is in the air, between a dead man and a living man, before the law confers it upon the living; and it is taken out, excised out, and is thus a tax on the privilege.

JUSTICE WHITE: It was defined to be a tax on the act of transmission, not on the privilege or something in the air, but on the act. You say that is the case in France?

MR. COUDERT: Yes, sir; that is the French administrative practice.

JUSTICE WHITE: It was likewise so in Germany, a tax on the act of transmission. Now, this tax is on the act of sale, is it not?

MR. COUDERT: But that act of sale, if your Honor please, is an integral property right, and the act of transmitting the property from a deceased person to his heir is not, but it is a privilge, and made the subject of a tax, like an occupation tax, for instance. A man can be taxed because he is a lawyer, indirectly, but he cannot

be taxed indirectly because he is a man, because that is a capitation tax and must be apportioned. A man does a certain thing, and if the law attaches no importance to it, it is not a legal act at all. But the law does attach a certain importance to the making of a will, and what is that law? That is the statutory law. It is a privilege. It is not a part of the property. It is not one of those acts which is a necessary and integral part of property, protected by the Constitution of the United States.

That is the distinction, and it seems to me that it is a clear distinction, and that is why it may be perfectly proper to advert in the Knowlton case to the administrative definitions in France. Those definitions, I think, are based on the fact that the assessment rolls, when they make them up in France, include all the taxes on land, and taxes that they cannot put on the rolls at the beginning of the year they consider indirect taxes, simply because they cannot make up their assessment rolls in advance. That is all. It is purely a matter of administrative usages, and does not conflict in any way with what the Court has said in the income tax cases, and which is now the final criterion.

In Magoun *v.* Illinois, to which Mr. Justice McKenna referred, it is stated: "An inheritance tax is not one on property, but one on succession."

JUSTICE MCKENNA: I understood you to say that it was decided in that case that the State could take it away absolutely.

MR. COUDERT: Well, as I understand it, that is the inference from that decision. That is the doctrine.

JUSTICE MCKENNA: No; as I remember the case, I expressly excluded that idea in the opinion.

MR. COUDERT: Your Honor is more familiar with it than I am, of course. I may have misstated it. I will read the extract upon which I base my statement.

JUSTICE MCKENNA: You probably may have misunderstood it.

JUSTICE WHITE: The Court said in that case, referring to that proposition:

> "The second principle"—that is the very principle to which you refer—"was given prominence in the arguments at bar. The appellee claimed that the power of the State could be exerted to the extent of making the State the heir to everybody, and the appellant asserted the natural right of children to inherit. Of the former proposition we are not required to express an opinion."
>
> "On the contrary, the Court directly declined to express an opinion, but said, however, it may be the subject of regulation. The State has the power to regulate it, but the Court expressly refrained from deciding whether that power of legislation would extend further."

MR. COUDERT: Possibly I stated it too broadly; but I will read the three lines on which I based my assumption. "The right to take property by devise or descent is a creature of the law, and not a natural right, a privilege, and therefore the authority which confers it may impose conditions upon it."

I hardly think we would say the right to possession of a man's property was a privilege, under the Constitution, and it seems to me that while I may have stated the actual decision broadly, the doctrine laid down in those three or four sentences, and in line with the case of Perkins *v.* The United States, Fox *v.* The United States and the other cases, makes that quite clear.

In any event, I argue that the distinction between Knowlton *v.* Moore and our case is, that this is on one of the fundaments of property, and according to the general doctrines and jurisprudence enunciated very clearly by this Court, there is a radical distinction between transmission of property as a legal incident to death and transmission of property *inter vivos.*

We have, therefore, reached this point:

That on principle, considered logically and economically, the tax is one upon property.

Second, that under the doctrine of the income tax cases, the question of the ultimate incidence of the tax was very largely determinating, unless there was something in the positive law the other way.

Third, we have seen that neither in English law nor in American law has there ever been *any construction* of this tax which would be binding or which would in any way affect the judgment of this Court against holding it to be a direct tax.

The income tax cases, therefore, lay down the principle for which we contend.

I am aware of the dissent in the income tax cases, and I would like to take up for a moment the "grammar of dissent," as well as the "grammar of assent." I think the grammar of dissent is also in our favor. That system was predicated, as I understand it, upon this: that the views of economists as to shifting incidence were matters that could not be taken into consideration; that it was not a primary question at all; that the question had been settled by long statutory construction and by the decisions and dicta of this Court: that the only direct taxes were land taxes and capitation taxes.

I have no serious quarrel with the doctrine laid down in the minority opinion in those cases, because I contend that this is a land tax; that this tax falls upon the owner of every particle of land. If he sells the land, he has to pay it, and the incidence cannot be shifted from him. If he does not sell it, nevertheless, it is a tax on the alienability of the property, and makes it less valuable. If the law said that every conveyance of property valued at more than fifteen or twenty thousand dollars, should pay two or three thousand dollars tax, it would make property much less valuable, and would be felt by all property owners. Therefore, even under the narrower theory that direct taxes are only capitation taxes and taxes on land, I claim that this is a direct tax upon property, and cannot be distinguished from it.

That land taxes are direct all the members of this Court have agreed. That question can never be reconsidered. It is finally adjudicated. This tax is one on land and even had no other argument existed that would be final. We desire to press this view with much earnestness as it seems a short, complete and logical determination of the question.

My friend on the other side, seems to me to concede the basis of our argument, when he says:

> "A tax upon the sale of lands is a tax upon only one of the many rights and incidents peculiar to and necessarily connected with the ownership of real property, while a tax upon the land on account of one's general ownership thereof is manifestly a tax upon each and all of the many rights and incidents appertaining to the ownership of real property. The former tax can not be the legal equivalent of the latter tax for the reason that a part can never equal the whole."

But if we apply the same reasoning to an income tax, the conclusion is the same.

> "A tax levied upon the income from lands is necessarily a tax upon each and all of the many rights and incidents appertaining to the ownership of the lands, and, as was said by Mr. Justice White, 'is the legal equivalent to a tax upon the lands.' It follows, therefore, that such a tax is not the legal equivalent of a tax levied upon only one of the many rights and incidents necessarily connected with the ownership of the lands."

It seems to me that that is absolutely unsound. Suppose I owned a house, and am offered five thousand dollars rent for it, but do not choose to accept that while the income tax is in force. I am not taxed one dollar. Why? Because I have not rented my house. I am living in it and getting the benefit of it. So that the in-

come tax is not, any more than this tax is, a general tax on all property, or the possession of it, but only on that from which you, derive rent, as in the illustration just given. If I rent my house, and get the income from it, I am taxed, otherwise not.

In the same way the argument is applicable to this case. I own my house. I do not sell it. Very good; I do not have to pay the tax, although the property may be affected by the tax. But if I sell it,—just as though I should receive the income from it under the illustration just given as to the income tax,—then I must pay a tax. So that the income tax decision and this tax upon the conveyance of real estate are so intertwined and intermarried that I say it is absolutely, logically impossible to disentangle them. An arbitrary distinction may be made, and it may be said that a tax upon the act of sale of property, regardless of anything else, is an indirect tax. In that event, we would have to bow to the majesty of the law, but in reason this tax cannot be differentiated from the tax on incomes, the right to which is one of the incidents of property. Income may or may not exist. Many of us do not get any income from our property, but rather derive losses, and the income tax would not affect us. Therefore, it is unsound to say that such a tax is a tax upon all property, by reason of the ownership alone, whereas this tax is only a tax upon one of the rights necessarily connected with property.

David Wells, the economist, said that before the enactment of the Civil War tax statute, there have never been in the history of the world, since the days of scholasticism, so many absurd and subtle distinctions made; that since the time when the question was discussed by learned doctors as to how many angels could stand on the point of a needle, until the time of the distinctions made in the various internal revenue acts between various kinds of taxes, and how they should be paid, there never has been so much unprofitable discussion.

It seems to me that the Court has put an end to much of that in the Fairbank case by saying: We are going

to study these things, we are going to discard all fictions and find out exactly what and where the tax strikes.

The excise taxes have almost from time immemorial, certainly from the seventeenth, if not from the sixteenth century, in Holland and England been considered as indirect taxes by the law-makers and economists and everybody, because it has been said that it was the consumer that paid, and hence they were taxes on consumption.

I am perfectly willing to admit that the Hylton case was properly decided, when it was said that a tax on carriages let out by a carriage owner was perfectly proper, that it was on his occupation, so that the tax was recouped by reason of his charging more for his carriages; that it was not in conflict in any way with the income tax case, because not only the economists but English thought generally, for a great many years, had always considered those taxes as falling on the consumer, and as consumption or expense taxes.

Therefore we cannot assume that there was any doubt in the minds of the framers of the Constitution that the general class of excise taxes were indirect taxes. They knew the excise taxes were indirect taxes, and therefore when they appeared in the Constitution and when they were enforced, people did not challenge their constitutionality, because it was clear as to what the Constitution meant when as to them.

That reasoning, however, is not applicable to this particular and peculiar tax on real estate conveyances: as we have shown, it only came in very late in the development of English law; we have only seen it once in the development of our own law, and all our precedents are to the effect that this is a direct tax either because it is a land tax or because, like an income tax, it falls on the land, or on both grounds.

Therefore, logically, economically and legally, it is a direct tax. There is nothing in the law which militates against that view, and, as I conceive, there is absolutely nothing in our decisions which holds that a tax of this kind can be assimilated, for instance, to a tax on sugar, or spirits, or on occupation.

In closing, I can only say that in its nature, in its inherent nature, the tax is directly and really upon property. It cannot be even plausibly argued that it is upon anything else; there is nothing in the genesis and historical development of our tax system to show that it can be considered by anybody as otherwise than a tax upon real estate; and that, further, the income tax cases, by their definitions of direct taxes and the case of Nicol *v.* Ames by its differentiation between sales in an exchange and sales everywhere, and the case of Fairbank *v.* The United States, by its doctrine that the real nature of the tax would be looked into, cannot be reconciled with any other theory than the theory on which we proceed, that this is a direct tax, and, not having been apportioned, is therefore unconstitutional.

WASHINGTON, D. C., Friday, December 4, 1903,
12 o'clock M.

The hearing of this cause was resumed at the above date and hour, the Chief Justice and all the Associate Justices being in attendance.

Present on behalf of the plaintiff in error, MR. COUDERT and Mr. FULLER.
Present on behalf of the United States, Mr. PURDY.

Argument of Paul Fuller, Esq., on behalf of the Plaintiff in Error.

MR. FULLER: With the permission of the Court, I will trespass a very few moments in making a brief reply to the Honorable Assistant Attorney-General.

It is incumbent upon me first to take up the question of voluntary payment. It will be sufficient to say that my friend on the other side has mistaken the purport of the several decisions, which he quotes to the Court, beginning with the Elliott *v.* Swartwout case. As the Court will remember, all those cases were cases against collectors and the pre-requisites to a cause of action were aimed to protect the collector, the agent of the United States, who had paid over to the United States the money collected, and who could not be held responsible unless he had been apprised of a protest. So much for those cases.

Turning now to the statutes which the Honorable Assistant Attorney-General has quoted in his brief, I think that your Honors will find them simple, coherent and perfectly satisfactory to sustain the jurisdiction of this Court, without entering any further protest than that which we have made.

Section 31 of the law, which is quoted at page 13 of the Attorney-General's brief, says: "That the Commissioner of Internal Revenue, subject to the regulations of the secretary of the treasury, shall be, and hereby is, authorized to remit, refund and pay back all duties

erroneously or illegally assessed or collected, and all judgments or sums of money recovered in any court against any collector or deputy collector for any duties or licenses paid under protest."

That is an administrative authority and discretion given to the commissioner to act individually and return the funds without any appeal to this Court or to any Court. Moreover, that is the law of 1862 long since replaced by a statute in which no mention is made of a "protest."

If we turn to page 15 of the Attorney-General's brief, we find Section 3226 of the law, which contains this language:

"No suit shall be maintained in any Court for the recovery of any internal tax alleged to have been erroneously or illegally assessed or collected * * * until appeal shall have been duly made to the Commissioner of Internal Revenue, etc."—not, as my friend supposed and stated, until "*an* appeal has been *taken.*" That is a technical nomenclature of the courts; but the expression of the act is "until appeal shall have been duly made." In other words, until an objection to the payment in the form of an appeal or an application to the Commissioner of Internal Revenue shall have been made. That is the protest provided by this law, and that is the protest which has been made in this case.

This is made still plainer by Section 3228, cited at page 16 of my opponent's brief,—and it is a great privilege to have an arsenal provided by the other side from which to draw ammunition. Section 3228 reads: "All *claims* for the refunding of any internal tax alleged to have been erroneously or illegally assessed or collected * * * must be presented to the Commissioner of Internal Revenue within two years next after the cause of action accrued." That specifies the officer to whom the protest or "claim" can be made.

JUSTICE BROWN: Was there not in this case an application made for a refund?

MR. FULLER: Yes, sir; and it was denied. That was alleged in the petition. We could not make the protest to any post-office clerk who sold stamps, nor even

to the collector who did so, because there is no provision for submitting a protest to the collector. The application, or the appeal, or the claim,—in other words, the protest, the evidence that the payment was not voluntary,—must be made to the Commissioner.

JUSTICE PECKHAM: It does not appear how these stamps were procured, or where?

MR. FULLER: No, sir, except that they were procured from the collector.

JUSTICE HARLAN: Where? When?

MR. FULLER: In New York, within the two years.

JUSTICE HARLAN: Some while before the application for permission to refund?

MR. FULLER: Yes, sir.

JUSTICE HARLAN: More than a year?

MR. PURDY: Eighteen months.

MR. FULLER: I take the word of the Assistant Attorney-General on that point. I really do not remember, but I know it was within the statutory time required by the law, that we made application for a refund.

JUSTICE BROWN: Were these stamps procured for use on any particular instrument, or were they procured generally?

MR. FULLER: I do not believe the petition shows that, but Mr. Coudert informs me he believes that they were procured generally.

JUSTICE DAY: Is there any discretion in the Commissioner to refund if he saw fit?

MR. FULLER: He can if there has been an application of some kind; but in order to have recourse to the courts, no suit shall be brought until application has been made; that is, "until appeal has been made to the Commissioner for a refund"—not an appeal *from* anything.

JUSTICE DAY: I understand.

MR. FULLER: With that, I will leave that question to the discretion of the Court and proceed to answer certain of the objections made by the learned Assistant Attorney-General.

The task of discussion has been facilitated by the presentation in the brief of the Attorney-General.

At pages 41 to 44 of the brief we find this statement: That this is not to be assimilated to the income tax, because the income tax touches and reaches *all the rights and elements that go to make up property;* and that when a man is compelled to pay a tax upon an income of his property, he pays a tax bearing upon all the elements—possession, alienability, enjoyment; while a tax upon the conveyance of the property touches only one of those rights or elements, and therefore they are not to be assimilated.

Even if that statement were correct, it would be sufficient to show its own inefficacy, for I am quite as much deprived of my property by having one of its material and essential elements interfered with as if they were all interfered with. It is not necessary to murder a man that you should eviscerate him. It is sufficient if you touch his heart. And that is precisely the situation here.

But the illustration is erroneous,—totally misconceived. The income tax does not touch all the elements or rights in property. It touches only one,—the right of enjoyment; in other words, the right of getting money out of it; the right of revenue or rental. It does not touch the property that a man does not lease. It does not touch the property that a man does not receive any cash from. It does not touch his right of possession. He can remain in his palace on Fifth Avenue, without any rent, and pay nothing by way of income tax out of the annual value of that property. Therefore it does not touch his right of possession. He can sell that property, and pay no income tax on the proceeds. So that it does not touch the right of alienation. It touches one of the three essential elements necessarily connected with the ownership of property. And that term: "necessarily connected with the ownership of property" I borrow again from my friend (p. 33, Gov't. Brief). With the candor characteristic of the Department of Justice, he does not deny that the power of alienation is necessarily connected with the right of ownership of the property.

That is the only difference between those cases of the tax on income, and the tax on alienation.

Whether the tax touches my right to sell, whether it touches my right to rent, it is absolutely and identically the same interference with property.

Another view of that: It has been said that a tax that is upon an act of transmission, or upon an occasional act, voluntarily undertaken by the owner, is not a tax upon the property. Let us take that statement and examine it. What is a tax on the income of realty? Is it not, in reality and substance (and it is reality and substance that the court is looking for) a tax upon his lease? If he does not lease the property, the income tax does not fall upon it, but when he does lease the property and collects the rental, then that becomes a part of the income, and he would have to give it up; such a tax was considered a direct tax upon property, which had to be apportioned. Now in relation to conveyances. When a man chooses to make a conveyance, and collects the purchase price, this tax excises a part of the purchase price and takes it away from him and keeps it. Is there any difference? There may be, but none within my comprehension.

Therefore there is an absolute similarity to the income tax cases. If they are to be sustained, if Knowlton *v.* Moore* has not undermined them,—whether it

Knowlton v. *Moore* sustains a tax upon the transmission of an inheritance. That the transmission of property after death is a mere privilege granted by the State as distinguished from a right of property which can only be disturbed by due process of law, is abundantly shown by the cases already cited of *U. S.* v. *Perkins*, 163 U. S., 625; *Magoun* v. *Illinois Trust Co.*, 170 U. S., 283, and the cases there commented on, but, the attention of the court is called to the case of *U. S.* v. *Fox*, 94 U. S., 315, in which a devise to the United States was declared void under the law of New York, which only permitted devises to corporations expressly authorized to take by devise.
The Court says (p. 231):

> "The power of the State to regulate the tenure of real "property within her limits, and *the modes* of its acquisition and transfer, and the *rules of its* descent, *and the "extent to which a testamentary disposition of it may be "exercised* by its owners is undoubted * * * Every "person must therefore, devise his lands in that State "within the limitations of the Statute *or he cannot devise "them at all. His power is bounded by conditions.*"

was the purpose of the opinion to undermine them or not,—I will leave it to the court to say, and I leave it to the court to say whether they consider that it has undermined them—if the income tax decisions are to be sustained, then a tax upon rentals, upon the proceeds of a lease, is a direct tax upon property. And a tax on a sale, or the proceeds of a sale, are equally a direct tax on the property. There is no getting over it. If you take the very reasoning of the Attorney-General, on pages 41 to 47 of his brief, he has reduced it to that. He has tried to differentiate between a tax on one of these elements of property and a tax upon another. With all respect to the acumen of the Department of Justice, they have not so differentiated it.

I cannot see, if your Honors please, that there is anything further to be said in this case. My learned and better equipped associate has gone over the ground very fully, and the only purpose of this reply was to emphasize the admissions made by the Attorney-General. Whether the decision in this case is going to affect the revenues of the country has absolutely nothing to do with it. In the income tax cases, the revenues, as Mr. Reed said, were affected vastly; but the solution of a problem of this character does not depend upon whether Congress will be obliged to resort to other methods of taxation to make up the loss.

As a matter fact the law has been repealed and the amount involved is comparatively small.

I entirely agree with the Assistant Attorney-General that the power of Congress is omnipotent and reaches everywhere, even to a man's grave, for taxation; but the power may only be exercised under certain expressed limitations. It must be done in the way prescribed by the Constitution, and when it is a direct tax, it must be apportioned.

Here let me observe that the term "direct" has no reference to the form or method of taxation. "Apportionment" is a method. But whether a tax is "direct" depends upon the substance and effect of the tax, and,

no matter how tortuous or evasive or deceptive is the method employed to make it appear indirect, if it falls upon the property directly, if it takes something out of that property which cannot be recouped against anybody else, it is direct.

This Constitutional provision was not an invitation to the legislature to try conclusions with Polonius, and endeavor "by indirection to find direction out;" it was a prescription that whatever touched property directly should be apportioned. And I cannot conceive of anything more direct than the taxing of rentals and the taxing of the purchase price of a man's property.

The Government Brief makes an attack upon the Constitutional rule of apportionment, but as stated in the Income Tax Cases (157 U. S.) the rule was imposed, it was accepted, and it must be respected until constitutionally removed.

With that, I leave the case to the Court, having fulfilled my promise to occupy but a few minutes of the Court's valuable time.

Mr. Coudert: If the Honorable Court has no objection, I should like to cite one authority in connection with that portion of my argument of yesterday regarding the practice of the French administration, and in connection with Mr. Justice White's question on that subject.

The Chief Justice: Certainly.

Mr. Coudert: It is simply this: Mr. Justice White, in Knowlton *v.* Moore, largely based his decision upon what was the practice of the French administrators in regard to the official classification of taxes. Mr. Leroy-Beaulieu, who is the greatest authority on finance in France, says this in his book—and I will translate it because I am afraid the Court might not understand my French: "It is remarkable that the French administration of finance classifies license taxes among direct taxes, but on the contrary, license taxes on wine merchants are classed as indirect taxes. One of the strangest anomalies of this kind outside of France is

that of the Italian administration, which classes as direct taxes all taxes upon millers, but as indirect taxes those upon other businesses; and therefore," he goes on to say: "This administrative definition is altogether empirical and illusory. *It confounds things* which ought to be distinct, and it has as a basis for classification only accessory and incidental characteristics, and none of the principal characteristics of the taxes whatever."

It is simply useful in an administrative sense, in making up the assessment rolls.

MR. PURDY: I would like the permission of the Court to file a supplemental brief on the question of protest—just a few pages.

THE CHIEF JUSTICE: Can you file that within a couple of days?

MR. PURDY: Yes, your Honor.

THE CHIEF JUSTICE: Very well; within two days.